

DONALD CLAXTON

V.

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

Docket No.
SL03538010094

OPINION AND ORDER

Appellant filed a petition for appeal with the Board's St. Louis Field Office, contending that the agency failed to restore him to his position following a compensable injury, as required by 5 U.S.C. § 8151. The agency responded to the appeal, contending that appellant had no right to restoration since he declined to return to duty in a limited capacity and, instead, resigned for personal reasons. The presiding official thereafter ordered the parties to submit legal memoranda addressing the issue of appellant's entitlement to restoration in light of his resignation. Appellant responded, through counsel, asserting that "... a genuine issue of fact exists as to whether any 'resignation' occurred, in that, petitioner was ordered by respondent to return to work in the hazardous environment of the Medical Center for Federal Prisoners, Springfield, Missouri, while petitioner was under a doctor's care, which doctor had not released him for return to duty. Petitioner contends, and will present evidence at hearing, that petitioner did not voluntarily resign." The agency also responded, and it argued that because appellant resigned voluntarily from his position, he was not an "employee" for purposes of restoration under 5 C.F.R. § 353.103(c)(1).

By initial decision issued on January 8, 1981, the presiding official found that although appellant had contended that his resignation was involuntary, he had not during the administrative processing of the appeal "provided any evidence tending to prove that his resignation was involuntary." He concluded that appellant had not met his burden of showing an involuntary resignation, and dismissed the appeal as not within the Board's appellate jurisdiction. The initial decision made no reference to appellant's request for a hearing.

In the petition for review, appellant contends that it was error under 5 U.S.C. § 7701(a) for the presiding official to have denied him a hearing in connection with his appeal. The agency response asserts that the initial decision was correct and urges the Board to deny the petition.

5 U.S.C. § 7701(a)(1) provides that an appellant has a right to a hearing on an action appealable to the Board. An agency's failure or refusal to restore an employee under 5 U.S.C. § 8151 is an action appealable to the Board. 5 C.F.R. § 353.401(a). However, it is also evident that under the circumstances in this case, appellant's right of appeal is necessarily dependent on the nature of the disputed resignation. If appellant's resignation was voluntary, then he was not an employee for purposes

of restoration and has no right of appeal to the Board. On the other hand, if appellant's resignation was involuntary, then his separation from the agency was effected in violation of his rights, and he would be considered an employee for purposes of restoration and appeal to the Board.

The Board has consistently held that where an employee's right of appeal is, as here, dependent on an alleged involuntary action, the presiding official must carefully examine the employee's allegation, and if it is found to be non-frivolous, grant the employee a hearing on that issue. *Cahill v. Department of Agriculture*, 4 MSPB 26, 27 (1980); *Spiegel v. Department of the Army*, 2 MSPB 307 (1980); *Myslik v. Veterans Administration*, 2 MSPB 241 (1980); *Ragland v. Internal Revenue Service*, 2 MSPB 401 (1980); *Murray v. Defense Mapping Agency*, 1 MSPB 338 (1980). See *Bell v. Groak*, 371 F.2d 202, 204 (7th Cir. 1966); *Goodman v. United States*, 358 F.2d 532, 533 (D.C. Cir. 1966); *Dabney v. Freeman*, 358 F.2d 533, 535 (D.C. Cir. 1965). Accordingly, the issue before the presiding official was not whether appellant had met his burden of showing that his resignation was involuntary, but rather, whether appellant had raised a non-frivolous allegation of involuntariness. As noted above, appellant had alleged that his resignation resulted from an improper agency order that he return to work while still recovering from an injury and in what he claimed was a hazardous environment. Appellant's version of the facts raised issues of possible abuse of agency procedures and discretion. Certainly, appellant had raised issues of fact which cannot be labeled frivolous.

Considering these issues and the fact that appellant had requested a hearing, the Board finds that the presiding official erred in deciding the appeal without affording appellant a hearing on the issue of voluntariness.

The petition for review is therefore GRANTED, the initial decision is hereby VACATED, and the case REMANDED for the purpose of affording appellant a hearing on the issue of the voluntariness of his resignation.

For the Board:

RONALD P. WERTHEIM.

WASHINGTON, D.C., May 5, 1981